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16 ATTORNEYS FOR PLAINTIFF
17 B&G FOODS NORTH AMERICA, INC.

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

B&G FOODS NORTH AMERICA, INC.,

Plaintiff,

v.

KIM EMBRY and ENVIRONMENTAL
HEALTH ADVOCATES, INC., acting as
enforcement representatives under California
Proposition 65 on behalf of the State of
California,

Defendants.

Case No. 2:20-cv-00526-KJM-DB

**OPPOSITION TO MOTION FOR
ADMINISTRATIVE RELIEF OF
DEFENDANTS KIM EMBRY AND
ENVIRONMENTAL HEALTH
ADVOCATES, INC., TO SHORTEN
TIME FOR A HEARING ON MOTION
FOR SANCTIONS UNDER RULE 11**

Judge: Hon. Kimberly J. Mueller

Courtroom: 3

1 Plaintiff B&G Foods North America, Inc. (“B&G Foods”) respectfully submits this
2 opposition to Defendants Kim Embry and Environmental Health Advocates, Inc.’s (collectively
3 “Defendants”) Motion for Administrative Relief of Defendants Kim Embry and Environmental
4 Health Advocates, Inc., to Shorten Time for a Hearing on Motion for Sanctions Under Rule 11 (the
5 “Administrative Motion”) (ECF No. 62).

6 **INTRODUCTION**

7 Defendants’ Administrative Motion should be denied because Defendants failed to properly
8 serve their supposed motion for sanctions, and in fact still have not served it, rendering their
9 request for an extension of time to file futile. Defendants’ attempt at service consisted of emailing a
10 brief to B&G Foods’s counsel on December 23, without first obtaining B&G Foods’s agreement to
11 accept service by electronic means. Service was both untimely, as it occurred exactly 21 days
12 before Defendants’ deadline to file their motion, and ineffective. Fed. R. Civ. P. 5(b); 11(c)(2).

13 B&G Foods welcomes the opportunity to address Defendants’ infirm Rule 11 motion and to
14 demonstrate that not only must it be denied, but that Defendants’ conduct in connection with that
15 motion is, itself, sanctionable. *See* Fed. R. Civ. Proc. 11(c)(2) (providing that the Court may award
16 attorneys’ fees to the prevailing party); *Patelco Credit Union v. Sahni*, 262 F.3d 897, 913 (9th Cir.
17 2001). Before Defendants filed the within application, B&G Foods offered to waive service and
18 set a reasonable briefing schedule. Defendants refused those overtures and filed their motion to
19 shorten time anyway. Accordingly, B&G Foods respectfully requests the Court respect B&G
20 Foods’s procedural right to be properly pre-served with Defendants’ motion and deny their request
21 for additional time to file a motion that was never properly served.

22 **FACTS**

23 On November 23, 2022, B&G Foods filed its Second Amended Complaint (“SAC”).
24 Consistent with this Court’s guidance, the SAC contains detailed allegations – including record
25 citations to evidence and testimony from Defendants’ witness – setting forth why their state court
26 claims against B&G Foods are shams.

27 In response, Defendants requested a 44-day extension of time to respond to the SAC so that
28 they could satisfy the safe-harbor provision of Rule 11 prior to filing a motion for sanctions and a

1 motion to dismiss. Ex Parte App. (ECF No. 59) (requesting an extension from December 7, 2022,
 2 to January 20, 2023). Defendants claimed that their Rule 11 motion would prove that allegations in
 3 the SAC regarding Defendants’ failure to comply with Proposition 65 regulations were false. (*Id.*)
 4 The Court Ordered Defendants to file their motion to dismiss and any Rule 11 motion by January
 5 13, 2023. Order Granting Ex Parte App. (ECF No. 61).

6 On December 23, 2022, Defendants emailed an untimely copy of their supposed Rule 11
 7 motion to counsel for B&G Foods. No attempt was made to serve the motion in compliance with
 8 Rule 5. Contrary to their representations to the Court, Defendants’ Rule 11 motion fails to show
 9 the SAC contains any false or frivolous allegations, while at the same time apparently conceding
 10 Defendants failed to comply with Proposition 65 regulations and spoliated evidence in connection
 11 with their state court lawsuits against B&G Foods.

12 Having realized they failed to timely serve the motion, on December 30, 2022, Defendants
 13 belatedly asked counsel for B&G Foods to stipulate to a *second* extension of time to file their Rule
 14 11 motion. Declaration of Jake Schulte, Ex. A (December 20, 2022 email) (ECF No. 62-1).
 15 Counsel for Defendants stated that he believed “at the time” he emailed the Rule 11 motion that
 16 Defendants had complied with the 21-day safe harbor period but “[s]ubsequently, Defendants
 17 learned of contradictory authority regarding when a Rule 11 motion for sanctions should be pre-
 18 served[.]” *Id.*

19 In response, B&G Foods informed Defendants they had failed to serve B&G Foods as
 20 required by Rule 11, but nonetheless offered to meet and confer and suggested an alternative
 21 briefing schedule. *Id.* (January 4, 2023 email). Defendants refused to accept this proposal, refused
 22 to meet and confer, and filed their motion.

23 ARGUMENT

24 Defendants’ Motion requests an extension of time to file a sanctions motion because
 25 Defendants failed to timely serve their motion on B&G Foods as required by Rule 11. “Rule 11
 26 provides that when sanctions are initiated by motion, the motion ‘must be served under Rule 5, but
 27 it must not be filed or presented to the court if the challenged per, claim, defense, contention, or
 28 denial is withdrawn or appropriately corrected within 21 days after service[.]’” *Corner Edge*

1 *Interactive LLC v. Johnson*, No. CV-19-05404-PHX-SRB, 2021 WL 2517956, at *3 (D. Ariz. Mar.
 2 15, 2021) (quoting Fed. R. Civ. P. 11(c)(2)). “This safe-harbor provision requiring service prior to
 3 filing is mandatory and strictly enforced in the Ninth Circuit.” *Id.* (citing *Islamic Shura Council of*
 4 *S. Cal. v. F.B.I.*, 757 F.3d 870, 872 (9th Cir. 2014) (noting sanctions not allowed unless “strict
 5 compliance with Rule 11’s safe harbor provision”); *Holgate v. Baldwin*, 425 F.3d 671, 677–78 (9th
 6 Cir. 2005) (“The 1993 Amendments to Rule 11 . . . place stringent notice and filing requirements
 7 on parties seeking sanctions. . . . We enforce this safe harbor provision strictly.”); *Truesdell v. S.*
 8 *Cal. Permanent Med. Grp.*, 293 F.3d 1146, 1151 (9th Cir. 2002) (calling compliance with the safe-
 9 harbor provision “mandatory”).)

10 Therefore, to file their motion on January 13, 2023, Defendants were required to serve it no
 11 later than December 22, 2022. Otherwise, Plaintiff would not have a full “21 days after service”
 12 “within” which to correct or withdraw any challenged allegations. *See* Fed. R. Civ. P. 11(c)(2);
 13 *Radcliffe v. Rainbow Const. Co.*, 254 F.3d 772, 788–89 (9th Cir. 2001) (Defendant was “required
 14 to serve its Rule 11 motion on the plaintiffs with a demand for retraction of the allegedly offending
 15 allegations, and then to allow the plaintiffs at least twenty-one days to retract the pleading before
 16 filing the motion with the court.”); Rule 11, Rutter Group Prac. Guide Fed. Civ. Pro. Before Trial
 17 Ch. 17-B (“Rule 11 sanctions cannot be imposed under a motion filed within 21 days after the
 18 motion was served[.]”). Defendants, however, emailed a copy of the motion to Plaintiffs on the
 19 day before Christmas Eve, December 23, 2022, which is both (1) too late to provide 21 days to pass
 20 prior to the Court-ordered filing deadline of January 13, 2023; and (2) not a method of service
 21 permitted under Rule 5 unless the parties agree otherwise in writing, which the parties have not
 22 done here. *See* Fed. R. Civ. P. 5(b)(E). As a result, the statutorily mandated safe-harbor period has
 23 still not begun. *See* Fed. R. Civ. P. 11.; *see also Radcliffe*, 254 F.3d at 788-89 (Because party “did
 24 not follow the mandatory service procedure of Rule 11(c)(1)(A), we reverse the award of
 25 sanctions.”).

26 Defendants waited the day before Christmas Eve to file their motion rendering it untimely.
 27 They now request an additional extension of four days to file their (still unserved) sanctions
 28 motion. Defendants’ motion offers no explanation for their failure to timely or properly serve their

1 motion *at any period of time*. Because the motion was never served, extending the time for filing
 2 would be futile and should be denied. *See e.g. Relman Colfax PLLC v. Fair Hous. Council of San*
 3 *Fernando Valley*, No. CV 19-8612 PSG (JCX), 2020 WL 9460650, at *1 (C.D. Cal. June 30, 2020)
 4 (extension of discovery deadline would be futile when defendant stated they would not comply
 5 with their discovery obligations even if granted the extension); *Ortiz v. Safeway Inc.*, No. 2:19-CV-
 6 00984-RAJ, 2020 WL 1468369, at *2 (W.D. Wash. Mar. 26, 2020) (finding extension of time to
 7 serve complaint would be futile because the claim would still be time barred).

8 CONCLUSION

9 For the foregoing reasons, B&G Foods respectfully request that the Court deny Defendants'
 10 administrative motion.

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 12 Dated: January 9, 2023

Respectfully Submitted,

13 BRAUNHAGEY & BORDEN LLP

14 By: /s/ David H. Kwasniewski
 15 David H. Kwasniewski

16 *Attorneys for Plaintiff*
 17 *B&G Foods North America, Inc.*